cise its power under s 106 to divide the property or the proceeds of sale of the property. In that case, a proper account could be taken of the respective contributions in cash or in services. In so far as they might have been indirectly relevant to the issue, the learned judge clearly took this consideration into account, as could be seen from his very carefully considered judgment.

Although it was not a point which was pressed by the appellant, we were of the view that the waiting period (before the matter could be considered again) was unnecessarily long. One of the two main reasons which made the learned judge decide that the matrimonial home should not be sold until the youngest child attains the age of 21 was the fact that if the property were to be sold then, the proceeds thereof would not be sufficient to meet all the payments required to be made, including the repayment to the appellant's CPF account the amount withdrawn which amounted to approximately $200,000. However, when the appellant reaches the age of 55 (in about six years' time) he will be entitled to withdraw all his moneys in the CPF account, and there will be no need to repay to the CPF all the moneys which the appellant had taken out of his CPF account to pay for the property. In our judgment that would be an appropriate point in time to review the matter again and determine whether the sale of the property ought to be made. We therefore varied the order of court of 7 November 1988 to reflect this. As we considered that the appellant had not succeeded on the grounds in his petition of appeal, we awarded the respondent one-half of her costs in the appeal.

Appeal allowed.

Solicitors: *B Rao & KS Rajah; BJ Lean.*

Reported by *Zarinah Marican*

Muhd Munir v Noor Hidah and other applications

HIGH COURT (SINGAPORE) — ORIGINATING SUMMONS NOS 253 OF 1990, 336 OF 1990, 466 OF 1990 AND 705 OF 1990
CHAN SEK KEONG J
25 OCTOBER 1990

Islamic Law — Jurisdiction of Syariah Court — Custody of Muslim children — Conflict of jurisdiction between High Court and Syariah Court — Whether the Syariah Court has exclusive jurisdiction — Distinction between jurisdiction and power — Supreme Court of Judicature Act (Cap 322, 1985 Ed), s 16(1) — Administration of Muslim Law Act (Cap 3, 1985 Ed), ss 35(1) & 52(3)(c)

Statutory Interpretation — Jurisdiction — Conflict in statutory jurisdiction between the High Court and Syariah Court in respect of custody of Muslim children — High Court's jurisdiction to be excluded when the Syariah Court has jurisdiction — Whether Syariah Court does have jurisdiction — Distinction between jurisdiction and power — Supreme Court of Judicature Act (Cap 322, 1985 Ed), s 16(1) —Administration of Muslim Law Act (Cap 3, 1985 Ed), ss 35(1) & 52(3)(c)

Family Law — Custody of Muslim children — Jurisdiction and powers of the High Court and Syariah Court to make custody orders — Guardianship of Infants Act (Cap 122, 1985 Ed) — Supreme Court of Judicature Act (Cap 322, 1985 Ed), s 16(1) — Administration of Muslim Law Act (Cap 3, 1985 Ed), ss 35(1) & 52(3)(c)

Words and Phrases — 'Jurisdiction' — Supreme Court of Judicature Act (Cap 322, 1985 Ed), s 16(1)

Words and Phrases — 'Power'

These four cases raise a common question as to the jurisdiction of the High Court to hear custody applications under the Guardianship of Infants Act (Cap 122, 1985 Ed) by Muslim parents. The principal area of contention was how s 16(1) of the Supreme Court of Judicature Act (Cap 322, 1985 Ed) ('SCJA') which provides that the High Court has no jurisdiction over civil proceedings within the jurisdiction of the Syariah Court, is to be read with s 52(3)(c) of the Administration of Muslim Law Act (Cap 3, 1985 Ed) ('AMLA') under which the Syariah Court is empowered to make custody orders. The jurisdiction issue is further complicated by a seeming contradiction in s 35 of AMLA which sets out the Syariah Court's jurisdiction in respect of certain matrimonial matters, but omits mention of custody.

In OS No 253 of 1990, the parties were divorced by decree of the Syariah Court which also provided that the issue of custody be referred to the High Court for determination at the request of both parties. The plaintiff-father then sought custody in the High Court. The defendant contended that the Syariah Court has jurisdiction with respect to custody proceedings under the AMLA, and as such the High Court's jurisdiction is excluded by s 16(1) of the SCJA. The plaintiff relied on the case of *Shaikh Salleh* v *Mariambee*[1] and submitted that AMLA does not affect the operation of the SCJA which is a statute of general application.

In OS No 336 of 1990, the parties were divorced by mutual agreement before a kadi and the divorce and a custody order were then registered at the Syariah Court. The plaintiff-

mother later sought custody in the High Court. The defendant then produced a letter from the Syariah Court stating that as the divorce was registered by a kadi through mutual consent, there was no order of court as to custody but merely a record of registration. The plaintiff also argued that s 52(3)(c) of AMLA, under which custody orders can be made in any application for divorce, can only refer to an application before the Syariah Court as the jurisdiction of the kadi is separate and independent of the Syariah Court.

In OS No 466 of 1990, the parties were divorced by a decree of the Syariah Court and an order for custody made in favour of the mother. The father later applied for custody in the High Court and obtained two ex parte orders granting him custody and directing the mother to deliver the children to him. He submitted that the jurisdiction of the High Court is not affected by AMLA, and that the Syariah Court had no jurisdiction or power to make any custody order under s 52(3)(c) of AMLA except a consent order.

In OS No 705 of 1990, the parties were divorced by decree of the Syariah Court. No order for custody was made as the parties had agreed that each would have custody of one child. The mother later applied to the High Court for custody of the child staying with the father. She argued that the Syariah Court's power to make a custody order is not limited to consent orders as it is not a mere recording agency, but a judicial tribunal with power to hear and determine disputes. Further, the power to make orders under s 52(3)(c) of AMLA is unqualified, and should be construed broadly so as to include a divorce application to the kadi.

Held, that the High Court has jurisdiction to hear all four applications:

(1) Before AMLA came into effect in 1968, the legal position was that the High Court had exclusive jurisdiction with respect to the custody of all children, whatever their race or religion, under the Guardianship of Infants Act 1934-1965 (Cap 50, 1936 Ed). That statute was recognized as a statute of general application by the Court of Appeal in *Shaikh Salleh* v *Mariambee*[1] in 1948. However, this case did not concern the jurisdiction of the High Court with respect to custody of Muslim children, as the jurisdiction of the court was never in issue.

(2) By s 16(1) of SCJA, if a civil proceeding comes within the jurisdiction of the Syariah Court, the High Court has no jurisdiction to try that proceeding. To exclude the jurisdiction of the High Court in the present proceedings, it is only necessary for the court in any civil proceeding before it to determine whether the Syariah Court has jurisdiction over the same proceedings.

(3) The jurisdiction of a court is its authority, however derived, to hear and determine a dispute that is brought before it. The powers of a court constitute its capacity to give effect to its determination by making or granting the orders or reliefs sought by the successful party to the dispute. The jurisdiction and powers of the High Court are statutorily derived. A court may have jurisdiction to hear and determine a dispute in relation to a subject matter but no power to grant a remedy or make a certain order because it has not been granted such power, whereas if a court has the power to grant a remedy or make a certain order, it can only exercise that power in a subject matter in which it has jurisdiction. The distinction between jurisdiction and power is recognized in the SCJA, ss 16 and 17 (which confer jurisdiction) and s 18 (which confers powers).

(4) Applying the analysis, the expression 'jurisdiction' as used in s 16(1) of the SCJA with reference to the Syariah Court, when read together with s 35 of AMLA, means the authority of the Syariah Court to exercise any judicial power given by AMLA in respect of the types of subject matter prescribed by s 35(2). As custody of children is a subject expressly omitted from s 35(2), and applying the expressio unius rule of construction, it is held that the legislature did not intend to confer jurisdiction on the Syariah Court to hear and determine issues with respect to custody of children.

(5) Section 52(3)(c) of AMLA which provides that the Syariah Court may, in any application for divorce, make such order as it thinks fit with respect to the custody of the children of the parties at any stage of the proceedings or after a decree or order has been made, confers power and not jurisdiction, for the following reasons. Firstly, paras (a), (b) and (c) of that subsection are concerned with the powers of the Syariah Court, the jurisdiction with respect to the corresponding subject matters having been provided for in s 35. It would be odd if para (c) were intended to have a different character in the same subsection. Secondly, the capacity of the Syariah Court to make custody orders exists only 'in an application for divorce', ie in or in connection with its divorce jurisdiction. Absent a divorce proceeding, the power cannot be exercised at all.

(6) As s 52(3)(c) merely confers power, as is the case, then the High Court in construing the proviso to s 16(1) of the SCJA will be concerned only with whether in the particular case before it, the Syariah Court is in a position to exercise its judicial power in relation to a subject matter in which it has jurisdiction, that is, if that application were or is capable of being brought before the Syariah Court. This is a question of fact and law.

(7) A number of pre-conditions have to be satisfied before it can be said that the Syariah Court has jurisdiction. First, it must have jurisdiction in relation to the subject matter of the application. As s 35(2) does not confer jurisdiction on the Syariah Court in guardianship of infants, it has no jurisdiction in relation to custody of children arising from the rights of guardianship per se. Second, the proceeding in question may not be capable of being brought to the Syariah Court for determination, eg where the parties have agreed to have the matter decided by the High Court and that agreement is binding on the parties. Third, given the position that s 52(3)(c) confers power, power can only be exercised if there is occasion to exercise it. There would be no occasion for the Syariah Court to exercise power where (i) there is no divorce application before the Syariah Court, as in OS No 336 of 1990 where the divorce was made before the kadi; (ii) there is a divorce application before the Syariah Court, but (a) the parties have no dispute with respect to custody of children for the Syariah Court to hear and determine the same, or (b) where there is a dispute, but the parties do not wish the dispute to be decided by the Syariah Court, as in OS No 253 of 1990; or given the structure of AMLA, perhaps (and this is obviously a matter for the Syariah Court to decide), (c) where the Syariah Court does not wish to exercise such power, even if the parties agree or one of the parties insists that the dispute be determined by it. In each of the above situations, the High Court would have jurisdiction to hear an application with respect to custody of Muslim children under the Guardianship of Infants Act as it would not be a civil proceeding falling within the jurisdiction of the Syariah Court in the sense that the Syariah Court cannot exercise its judicial power with respect to the application.

(8) However, if there is a situation where there is a pending divorce application before the Syariah Court and one of the parties insists that the custody dispute be determined by the Syariah Court but the other party makes an application to the High Court, then the Syariah Court may have jurisdiction (as defined) if it decides to hear and determine the dispute. It then has power under s 52(3)(c) to make a custody order on such terms as it thinks fit. As to the submission in OS No 705 of 1990 that the power of the Syariah Court is limited to making consent orders, this argument is unsound by reason of the words 'makes such orders as it thinks fit' in s 52(3)(c). In the final analysis, it is a matter entirely for the Syariah Court to decide.

(9) Section 52(3)(c) also empowers the Syariah Court to make a custody order at any stage of the proceedings or after a decree or order has been made. The ambit of these words is a matter for the Syariah Court to decide. If the Syariah Court decides to exercise such power where its jurisdiction in divorce is functus, it may be a consideration that the High Court will take into account in deciding whether its jurisdiction has been excluded by the decision. The issue can only be decided when it arises.

(10) Although the High Court has jurisdiction to hear all four applications, OS No 466 of 1990 is different from the others as in that case, the Syariah Court has made an order relating to custody of the children, albeit a consent order. Whether or not this order is binding on the parties or, if not, whether the High Court should depart from the order of the Syariah Court, which is a domestic court of competent jurisdiction established by an Act of Parliament, even where the circumstances warrant it, are issues which have not been addressed by counsel for the parties. It will be necessary to hear arguments on the status of an order of the Syariah Court in a proceeding in the High Court.

Cases referred to

1 *Shaikh Salleh* v *Mariambee* [1948] MLJ 186 (distd)
2 *Lee Lee Cheng* v *Seow Peng Kwang* [1960] MLJ 1 (folld)

Legislation referred to

Administration of Muslim Law Act (Cap 3, 1985 Ed) ss 35(1), (2), (3), 47(1), (2), (3), 48, 49, 50, 51, 52(1), (2), (3)(a), (b), (c), (d), (4), 55, 102, 105
Supreme Court of Judicature Act (Cap 322, 1985 Ed) ss 16(1), 17, 18

Mahendran s/o Mylvaganam for the plaintiff in OS No 253 of 1990.
Sidhambaram (Ms) (Legal Aid Bureau) for the defendant.
Rajan Nair for the plaintiff in OS No 336 of 1990.
Mahadi Abu Bakar for the defendant.
Susannah Roberta Siaw for the applicant in OS No 466 of 1990.
Noor Mohamed Marican for the respondent.
Noor Mohamed Marican for the applicant in OS No 705 of 1990.
Salehah Johari (Ms) for the respondent.

Cur Adv Vult

Chan Sek Keong J: This clutch of cases raises a common issue as to the jurisdiction of this court to hear applications by Muslim parents with respect to custody of their children under the Guardianship of Infants Act (Cap 122, 1985 Ed). The relevant facts of each case are summarized below.

1 *OS No 253/90*

The plaintiff (father) and the defendant (mother) were divorced on 8 March 1990 by a decree of the Syariah Court, para 9 of which (as translated) states: 'The issue of the child be referred to the High Court for a decision at the request of both parties.' The plaintiff now seeks the custody of the daughter.

2 *OS No 336/90*

The plaintiff (father) and the defendant (mother) were divorced by mutual agreement before a kadi who registered the divorce on 3 August 1989 in accordance with the provisions of the Administration of Muslim Law Act (Cap 3, 1985 Ed) ('AMLA'). No application for a custody order could be made before the kadi, but the parties, having mutually agreed on the custody of their children, appeared to have applied to the Syariah Court to register the terms of the divorce, including the terms of custody. The plaintiff has produced a copy of a certificate dated 3 August 1989 from the Syariah Court certifying that custody of the children had been awarded to the parties (two children to each). The certificate is endorsed with the following note: 'The divorce certificate will be issued to them on 13 November 1989 after the 'eddah' period expired.' The plaintiff now seeks the custody of the other two children on the ground (i) that the defendant has been detained as a drug addict and (ii) that she agreed to surrender custody of the two children to the plaintiff as she felt that she had no choice, having been advised by counsellors at the Syariah Court that that was the best course of action for her.

The defendant has also produced a copy of a letter dated 23 March 1990 from the Syariah Court stating that, as the divorce was registered by the kadi through a mutual agreement, 'there is no order of court made with regards to the custody of their children'. The implication of this letter is that the certificate dated 3 August 1989 issued by the Syariah Court is not an order of court, but merely a record of the registration.

3 *OS No 466/90*

The applicant (father) and the respondent (mother) were divorced by a decree of the Syariah Court made on 26 June 1989 on payment of [nafkah] eddah of $800 and mutaah of $3,000. An order for custody of the children was made in favour of the mother, with access to the father. The husband was further ordered to transfer the matrimonial home to the wife upon her reimbursing his CPF contributions. The father wants custody of the children. In this action, he has obtained an ex parte order for custody to be given to him and another ex parte order directing the mother to deliver the children to him, if necessary with the assistance of the police.

4 *OS No 705/90*

The applicant (mother) and the respondent (father) were divorced by a decree of the Syariah Court made on 21 September 1988. No application for an order for custody was made as the parties had mutually agreed that each would have custody of one child. The mother now wishes to have custody of the other male child as well on the ground that he desires to live with her and that she only agreed to give custody to the father at the time of the divorce because she was still a probationary officer in a bank and had to work overtime and was also financially unable to look after him.

Jurisdiction

The issue of jurisdiction arises by reason of the proviso in s 16(1) of the Supreme Court of Judicature Act (Cap 322, 1985 Ed) ('SCJA') which provides as follows:

> (1) The High Court shall have jurisdiction to try all civil proceedings where —
>
> (a) the cause of action arose in Singapore;
> (b) the defendant or one of several defendants resides or has his place of business or has property in Singapore;
> (c) the facts on which the proceedings are based exist or are alleged to have occurred in Singapore; or
> (d) any land the ownership of which is disputed is situated within Singapore;
>
> Provided that the High Court shall have no jurisdiction to try any civil proceedings which comes within the jurisdiction of the Syariah Court constituted under the Administration of Muslim Law Act.

The issue was first raised by counsel for the defendant in OS No 253/90. Her contention is that the Syariah Court has jurisdiction with respect to proceedings for custody of Muslim children under s 52(3)(c) of the AMLA (under which the Syariah Court may make an order with respect to custody) and accordingly the High Court's jurisdiction in the said proceeding has been excluded. Counsel for the plaintiff contends otherwise on the ground that AMLA does not affect the operation of the SCJA, which is a statute of general application. He refers to the decision of the Court of Appeal in *Shaik Salleh* v *Mariambee*.[1]

Counsel for the plaintiff in OS No 466/90 also contends the jurisdiction of this court is not affected by AMLA and relies also on *Shaik Salleh*'s case.[1] Additionally, she adopts the argument of counsel for the respondent in OS No 705/90 that the Syariah Court has no jurisdiction or power to make any custody order under s 52(3)(c) of AMLA except a consent order.

Counsel for the applicant in OS No 705/90 argues that the Syariah Court's power to make a custody order is not limited to consent orders as it is not a mere recording agency. It is a judicial tribunal with power to hear and determine such disputes. He further contends that as the expression 'In any application for divorce' in s 52(3)(c) of AMLA is unqualified, it should be construed broadly so as to include a divorce application to the kadi. The argument of counsel for the plaintiff in OS No 336/90 is that the said expression can only refer to an application before the Syariah Court as the jurisdiction of the kadi is separate and independent of the Syariah Court.

The jurisdictional issue has never been raised before in this court. It is not free from difficulty. However, I can proceed by stating that in my view, *Shaik Salleh*'s case,[1] decided in 1948, is not relevant to the issue as the proviso to s 16(1) of the SCJA was enacted in 1970 to take into account and prevent a conflict of jurisdiction between the High Court and the Syariah Court with respect to Muslims in Singapore. Before AMLA came into effect in 1968, the legal position was that the High Court had exclusive jurisdiction with respect to the custody of all children, whatever their race or religion, under the Guardianship of Infants Act 1934-1965 (Cap 50, 1936 Ed), that statute being recognized by the Court of Appeal in *Shaik Salleh*'s case[1] as a statute of general application. I should point out, however, that *Shaik Salleh*'s case[1] did not *decide* that the High Court had *jurisdiction* under the said statute with respect to the custody of Muslim children. The jurisdiction of the High Court was not in issue in that case as the parties, both Muslims, had voluntarily submitted to its jurisdiction by litigating under that statute. The issue there was whether Muslim law or English law (or the law as enacted in Cap 50, 1936 Ed itself) was the applicable law to determine which party had the better right to custody. The father relied on a Muslim law principle which, if applicable, would have given him custody. The mother relied on Cap 50, and in particular s 11 which provided that primary regard must be had to the welfare of the child. The Court of Appeal, affirming the decision of the High Court, held that the modification provision in the Second Charter of Justice could not be applied to Cap 50 which was intended to be of general application and also that no injustice or inconvenience would be done to Muslims in applying the statute to them.

Section 16(1) of the SCJA seems clear enough. It says that if a civil proceeding comes within the jurisdiction of the Syariah Court, the High Court has no jurisdiction to try that proceeding. To exclude the jurisdiction of the High Court in the present proceedings, it is only necessary for the court in any civil proceeding before it to determine whether the Syariah Court has jurisdiction over the same proceedings. To this question I now turn.

I start with a brief outline of the respective jurisdictions under the AMLA of the Syariah Court and of the kadi (including a naib kadi) with respect to marriage

and divorce and related matters. Part III sets out the jurisdiction of the Syariah Court, whilst Part VI sets out the jurisdiction of the kadi.

Jurisdiction and powers of the Syariah Court

Section 35 (which is in Part III) provides as follows:

> (1) The Court shall have jurisdiction throughout Singapore and shall be presided over by a president to be appointed by the President of Singapore.
> (2) The Court shall hear and determine all actions and proceedings in which all the parties are Muslims or where the parties were married under the provisions of the Muslim law and which involve disputes relating to —
>
> (a) marriage;
> (b) divorces known in the Muslim law as fasakh, cerai taklik, khuluk and talak;
> (c) betrothal, nullity of marriage or judicial separation;
> (d) the disposition or division of property on divorce; or
> (e) the payment of emas kahwin, maintenance and consolatory gifts or mutaah.
>
> (3) In all questions regarding betrothal, marriage, dissolution of marriage, including talak, cerai taklik, khuluk and fasakh, nullity of marriage or judicial separation, the appointment of hakam, the disposition or division of property on divorce, the payment of emas kahwin and consolatory gifts or mutaah and the payment of maintenance on divorce the rule of decision where the parties are Muslims or were married under the provisions of the Muslim law shall, subject to the provisions of this Act, be the Muslim law, as varied where applicable by Malay custom.

Section 35(1) confers jurisdiction on the Syariah Court with respect to disputes relating to divorces known in the Muslim law as fasakh, cerai taklik, khuluk and talak. Section 47(1) provides that a married woman may apply to the court for a divorce in accordance with the Muslim law. Section 47(2) provides that where the woman makes such an application, the Syariah Court shall summon the husband before the court and enquire if he consents to the divorce, and if he so consents, the court shall cause the husband to pronounce the divorce (talak) and on payment of the prescribed fees cause the divorce to be registered. Where the husband does not agree to divorce by the wife, s 47(3) permits the parties to agree to a divorce by redemption (khuluk), in which case, the husband also has to pronounce a divorce by redemption. Section 48 enables a married woman to apply for a divorce pursuant to the terms of a written cerai taklik and s 49 enables the wife to apply to the Syariah Court for and obtain a decree of fasakh on one or more of the grounds prescribed therein. To obtain any divorce, whatever type it is, the married woman has to make an application to the Syariah Court. Section 50 provides for the appointment of hakam. Section 51 enables a married woman to apply for maintenance during the subsistence of the marriage as well as after the divorce.

Then follows s 52 (which is also Part III) which sets out the powers of the Syariah Court in relation to the aforesaid matters as follows:

> (1) The Court shall have power to inquire into and adjudicate upon claims by married women or women who have been divorced for payment of her emas kahwin.
> (2) A woman who has been divorced by her husband may apply to the Court for a consolatory gift or mutaah and the Court may after hearing the parties order payment of such sum as may be just and in accordance with the Muslim law.
> (3) In any application for divorce the Court may, at any stage of the proceedings or after a decree or order has been made, make such orders as it thinks fit with respect to —
>
> (a) the payment of emas kahwin to the wife;
> (b) the payment of a consolatory gift or mutaah to the wife;
> (c) the custody, maintenance and education of the minor children of the parties; and
> (d) the disposition or division of property on divorce.
>
> (4) The procedure and forms of process in suits under this section shall be as prescribed by rules made under s 145.

An appeal from the decision of the Syariah Court lies to the Appeal Board under s 55 and the decision of the Appeal Board is final.

Jurisdiction and powers of the kadi

Under s 102 of Part VI of AMLA, the kadi or naib kadi also has jurisdiction with respect to divorce. Section 102 authorizes a kadi to register a divorce if he is satisfied after inquiry that both the parties have consented thereupon. If he is not so satisfied he must refer the application to the Syariah Court which may make such decree or order as is lawful under Muslim law. The kadi has no power to register a divorce by three talak. He must refer an application for such kind of divorce to the Syariah Court. The kadi's jurisdiction is therefore limited to approving a divorce by consent. Where the kadi approves the divorce, he records it in a register of divorce, which he is statutorily required to maintain, after which he issues a certificate of divorce signed and sealed with his seal of office. As a divorce effected before a kadi in accordance with the provisions of Part VI of AMLA is valid for all purposes, no further application to the Syariah Court is required. Section 105 provides for an appeal from the decision of the kadi to the Appeal Board whose decision is also final.

'Jurisdiction' and 'Powers'

The jurisdiction of a court is its authority, however derived, to hear and determine a dispute that is brought before it. The powers of a court constitute its capacity to give effect to its determination by making or granting the orders or reliefs sought by the successful party to the dispute. The jurisdiction and powers of the High Court are statutorily derived. Whether it has any common law

jurisdiction or powers is a question which is not relevant here. A court may have jurisdiction to hear and determine a dispute in relation to a subject matter but no power to grant a remedy or make a certain order because it has not been granted such power, whereas if a court has the power to grant a remedy or make a certain order, it can only exercise that power in a subject matter in which it has jurisdiction. The distinction between jurisdiction and power is recognized in the SCJA, ss 16 and 17 (which confer jurisdiction) and s 18 (which confers powers). In *Lee Lee Cheng* v *Seow Peng Kwang*,[2] the Malayan Court of Appeal had occasion to construe the meaning of these two expressions in the Courts Ordinance 1948 (from which the SCJA was derived). After analysing the relevant provisions dealing with 'jurisdiction' and 'powers' of the High Court, Thomson CJ concluded (at p 3) that:

> . . . in the Ordinance there is a distinction between the jurisdiction of the court and its powers, and this suggests that the word 'jurisdiction' is used to denote the types of subject matter which the court may deal with and in relation to which it may exercise its powers. It cannot exercise its powers in matters over which, by reason of their nature or by reason of extra-territoriality, it has no jurisdiction. On the other hand, in dealing with matters over which it has jurisdiction, it cannot exceed its powers.
>
> The view that in the Ordinance jurisdiction is not synonymous with powers gains strength when the Ordinance is considered in the light of the [Federation of Malaya Agreement 1948].
>
> Clause 77 of the Agreement provides that the Supreme Court shall be a court of unlimited jurisdiction, that it shall consist of a High Court and a Court of Appeal and that its constitution, powers and procedure may be prescribed by Federal Ordinance. Clearly here 'jurisdiction' must mean something different from 'power'. Jurisdiction is unlimited. But unlimited jurisdiction cannot mean unlimited power because as regards the powers of the court it is provided that these may be prescribed by Federal Ordinance and in the nature of things something which is unlimited cannot be capable of being prescribed. This leads to the conclusion that the expression 'jurisdiction' is used as meaning the authority of the court to exercise any judicial power that is given to it by the law and that when the Clause says that jurisdiction is unlimited it means that there is authority to exercise such judicial power as is given by law in any type of matter whatsoever in which the law authorizes or requires judicial power to be exercised.

I respectfully adopt the analysis of Thomson CJ to the construction of s 16 of the SCJA read with s 35(2) of the AMLA. Applying the analysis, the expression 'jurisdiction' as used in s 16(1) of the SCJA with reference to the Syariah Court, when read together with s 35 of AMLA, means the authority of the Syariah Court to exercise any judicial power given by AMLA in respect of the types of subject matter prescribed by s 35(2) which are, specifically, marriage, divorce, betrothal, nullity, separation of marriage, disposition or division of property on divorce or the payment of emas kahwin, maintenance, and consolatory gifts and mutaah. As custody of children is a subject matter expressly omitted from s 35(2), I should hold, applying the expressio unius rule of construction, that the legislature did not intend to confer jurisdiction on the Syariah Court to hear and determine issues with respect to custody of children.

However, it is necessary for the court to take into account the effect of s 52(3)(c) of the SCJA which provides that the Syariah Court may, *in any application for divorce*, make such order as it thinks fit with respect to the custody of the children of the parties at any stage of the proceedings *or after a decree or order has been made* (emphasis added). Is this provision intended to confer jurisdiction or power? In my view, s 52(3)(c) confers power and not jurisdiction, for the following reasons. Firstly, paras (a), (b) and (d) of that subsection are concerned with the powers of the Syariah Court, the jurisdiction with respect to the corresponding subject matters having been provided for in s 35. It would be odd if para (c) were intended to have a different character in the same subsection. Secondly, the capacity of the Syariah Court to make custody orders exists only 'in an application for divorce', ie in or in connection with its divorce jurisdiction. Absent a divorce proceeding, the power cannot be exercised at all.

If section 52(3)(c) merely confers power, as I think is the case, then the High Court in construing the proviso to s 16(1) of the SCJA, will be concerned only with whether in the particular case before it, the Syariah Court is in a position to exercise its judicial power in relation to a subject matter in which it has jurisdiction, if that application was or is capable of being brought before the Syariah Court. This is a question of fact and law. A number of pre-conditions have to be satisfied before it can be said that the Syariah Court has jurisdiction. First, it must have jurisdiction in relation to the subject matter of the application. As s 35(2) does not confer jurisdiction on the Syariah Court in guardianship of infants, it has no jurisdiction in relation to custody of children arising from the rights of guardianship per se. Second, the proceeding in question may not be capable of being brought to the Syariah Court for determination, eg where the parties have agreed to have the matter decided by the High Court and that agreement is binding on the parties. Third, given the position that s 52(3)(c) confers power, power can only be exercised if there is occasion to exercise it. There would be no occasion for the Syariah Court to exercise power in the following circumstances: (i) where there is no divorce application before the Syariah Court, as in OS No 336/90 where the divorce was made before the kadi; (ii) where there is a divorce application before the Syariah Court, but (a) the parties have no dispute with respect to custody of children for the Syariah Court to hear and determine the same, or (b) where there is a dispute, but

the parties do not wish the dispute to be decided by the Syariah Court, as in OS No 253/90, or, given the structure of AMLA, perhaps (and this is obviously a matter for the Syariah Court to decide), (c) where the Syariah Court does not wish to exercise such power, even if the parties agree or one of the parties insists that the dispute be determined by it.

In each of the above situations, the High Court would have jurisdiction to hear an application with respect to custody of Muslim children under the Guardianship of Infants Act (Cap 122, 1985 Ed) as it would not be a civil proceeding falling within the jurisdiction of the Syariah Court in the sense that the Syariah Court cannot exercise its judicial power with respect to the application.

However, there is one situation, ie where there is a pending divorce application before the Syariah Court and one of the parties insists that the custody dispute be determined by the Syariah Court, but the other party makes an application to the High Court. In this situation, the Syariah Court may have jurisdiction (as defined) if it decides to hear and determine the dispute. It then has power under s 52(3)(c) to make a custody order on such terms as it thinks fit. This situation is not before me, although counsel for the respondent in OS No 705/90 has contended that the power of the Syariah Court is limited to making consent orders. Although I do not think that this argument is sound by reason of the words 'makes such orders as it thinks fit' in the section, it is, in the final analysis, a matter entirely for the Syariah Court to decide. The jurisdiction of the High Court in relation to this situation will have to be considered when it arises.

Section 52(3)(c) also empowers the Syariah Court to make a custody order at any stage of the proceedings or *after a decree or order has been made*. What the ambit of these words is is again a matter for the Syariah Court to decide. If the Syariah Court decides to exercise such power where its jurisdiction in divorce is functus, it may be a consideration that the High Court will take into account in deciding whether its jurisdiction has been excluded by the decision. Again, in my view, this issue can only be decided when it arises.

Although I have decided that I have jurisdiction to hear all the four applications before me, OS No 466 of 1990 is different from the others as, in that case, the Syariah Court has made an order relating to the custody of the children, albeit a consent order. Whether or not this order is binding on the parties or, if not, whether this court should depart from the order of the Syariah Court, which is a domestic court of competent jurisdiction established by an Act of Parliament, even where the circumstances warrant it, are issues which have not been addressed by counsel for the parties. It will be necessary for me to hear arguments on the status of an order of the Syariah Court in a proceeding in the High Court.

Order accordingly.

Solicitors: *Mahen & Associates; AL Hussein & Co; Mahadi Abu Bakar & Associates; Noor Mohamed Marican & Associates; Saleha & Co.*

Reported by *Azra Moiz*

Oxley Travel Service Pte Ltd v Lee Kok Kian

HIGH COURT (SINGAPORE) — SCT APPEAL NO 4 OF 1989
SINNATHURAY J
20 OCTOBER 1990

Civil Procedure — Small claims tribunal — Material error in order of court — Non-compliance with statutory procedural requirement — Whether this vitiates order of court — Allegation of failure to be given fair opportunity to present case — Small Claims Tribunal Act (Cap 308, 1985 Ed), ss 15(4)(a),(b),(c) & 27

Administrative Law — Small claims tribunal — Natural justice — Failure to be given fair opportunity to present case — Small Claims Tribunal Act (Cap 308, 1985 Ed), s 27

The respondent filed a representative claim in the small claims tribunal on behalf of himself and 27 others claiming $700 per person in respect of a tour package purchased from a travel agent. The tribunal ordered the travel agent to pay the sum of $500 each to the respondent and 27 others. The travel agent appealed against the decision on the ground that the order stated the number of claimants to total 28, while there were actually 30 claimants. It was also submitted that there was non-compliance of s 15(4)(a) of the Small Claims Tribunal Act (Cap 308, 1985 Ed) ('the Act') in that Form 3 had not been signed by all claimants before the hearing, and that the appellants had not been given a fair hearing before the tribunal.

Held, allowing the appeal:

(1) When one counts the 27 items on Form 3, one finds that there are in fact a total of 30 claimants. So there is a material error regarding the number of claimants in the order of court.

(2) As to the non-compliance with s 15(4)(a), which provides that Form 3 must be signed by all claimants before the hearing, there was no document to show that all the claimants had in fact signed the claim before the date of hearing. The effect of the claimants not having signed would bring into play s 15(4)(b) by which the name of a claimant or person represented who has not signed the claim before the hearing may, if the tribunal so directs, be deleted from the claim and the amount of the claim reduced accordingly. There is nothing in the record that the tribunal before the hearing had allowed the claim to proceed, notwithstanding that all the claimants had not signed, or had ordered the deletion from